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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

No. 75-1613

NALCO CHEMICAL COMPANY,

Petitioner,

vs.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

REPLY BRIEF OF PETITIONER.

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The basic approach of the EPA brief in opposition to the petition is to gloss over the substantial legal issues in the case by arguing that the law is not in issue "but only its application to the particular facts of this case" which EPA terms "complicated" (Opp. Cert. Br. 19-20 and 27). While it is true that the scientific issues are complex, the legal positions taken in the five opinions in the court below are widely divergent and cannot be reconciled without distortion.

1. EPA argues that "all of the judges on the court of appeals apparently agreed with [the majority] interpretation of Section 211" and the only disagreement involved a "factual ruling" not worthy of review by this Court (Opp. Cert. Br. 13-14). Such an assertion only confuses the issue, which was strenuously argued by the majority and dissent, of the threshold determination required by Section 211 before regulation: May EPA regulate based on "fear of uncertain or unknown harm"

(Maj. Op. 56) or must EPA find that a "causal connection between lead emissions and the harm" is shown by the relevant scientific and medical data? (Dis. Op. 52)

2. The EPA brief also argues that there is no "plain disagreement of any consequence among the judges of the *en banc* court regarding the scope of review" (Opp. Cert. Br. 13), despite the clear dispute of Judge Leventhal with the opinion of Judges Bazelon and McGowan. EPA seeks to create an aura of uncertainty as to the views of these two judges (Opp. Cert. Br. 13 (n. 10) and 20), and argues that "the extent of the disagreement among the majority is too uncertain to warrant review by this Court" (Opp. Cert. Br. 20).

EPA argues that even if the opinion of Judges Bazelon and McGowan are "starkly at odds with the views of the rest of the Court" (as they indeed are) nevertheless "seven of the nine judges on the Court now appear to be in unqualified agreement as to the reviewing court's responsibility" (Opp. Cert. Br. 21). This assertion is based upon the statement of the dissent that "we find our colleagues do not differ with us on the standard of review" (Opp. Cert. Br. 19). However, that statement refers to the lack of material disagreement as to the "arbitrary and capricious" standard applicable to agency conduct in determining whether a clear error of judgment has been committed (Dis. Op. 64, n. 139). On the crucial question of the scope of review three divergent views are presented as to the extent and degree to which the Court will inquire into the administrative record to determine whether or not the agency has committed a clear error of judgment.

The argument that "This decision thus settles the law of the circuit, and the court presumably will follow it" (Opp. Cert. Br. 21), and the suggestion that the "intra-circuit conflict" is too unimportant to "command the Court's attention in any event" (Opp. Cert. Br. 20), ignores entirely the importance of the Court of Appeals of the District of Columbia in review of en-

vironmental regulations and the need to settle the obvious conflict within the court on the question of scope of review.

3. EPA also downplays the legal issues relating to lack of notice and opportunity to petitioner to comment as involving only "facts peculiar to this case alone" (Opp. Cert. Br. 27). This argument ignores the fundamental legal question dividing the court below and the important precedent set for the procedures of administrative agencies and reviewing courts: Are parties interested in regulations (and the public) required to engage in the equivalent of civil discovery (*e.g.*, document requests and interrogatories) to discover the material being relied upon by the agency proposing regulations?*

4. EPA's brief avoids the substantial legal question as to the lower court's reliance on documents not part of the administrative record, in deciding the important issue of lack of an opportunity to comment. EPA devotes a footnote to a factual discussion admitting that EPA letters transmitted to the court below, after oral argument, made assertions as to "approximate dates when certain documents were in fact received and transmitted to the file" and that these statements were "based on *other agency records*" (Opp. Cert. Br. 27 (n. 17)). No attempt is made by EPA to distinguish the clear conflict between the action of the court below and the holding of this Court in *Camp* v. *Pitts*, 411 U. S. 138 (1973). Rather, EPA dismisses this issue as a bad "practice" but not "otherwise improper" (*Id.*). This is akin to a layman's dismissal of the due process of law governing criminal trials as a "technicality".

5. The EPA also seeks to dispose of the issue of the economic penalty of the regulations by two brief footnotes where it asserts that "most of the . . . reduction in lead usage"

* Under the facts in this case, such a procedure would have involved an almost daily scouring of an inadequately indexed "public file" (Maj. Op. 100-01), learning about and attending agency advisory committee meetings and agency sponsored "invitation-only" seminars touching on the subject (*Id.* 101-02 and 105), and even filing a Freedom of Information Act lawsuit against the agency (*Id.* 108-09).

will be due to unleaded fuel required for the lead-intolerant catalytic converter, and that the regulations will result in a crude oil penalty of "only one and one-half percent" by 1985, based on the assumption that the lead-intolerant catalytic converter will be used in the future on substantially all new cars (Opp. Cert. Br. 4(n.2); 10(n.7)). Thus EPA ascribes most of the economic penalty of removal of lead from gasoline to the catalytic converter and not the regulations here, and it is incorrectly implied that the regulation here in issue, whether necessary or not, will result in no material economic harm.

This myopic view of the future overlooks the absence of certainty that the lead-intolerant catalytic converter will continue to be used in the future, in view of the many potential technical solutions for emissions control and fuel conservation which do not involve the lead-intolerant converter, some of which are in use on vehicles today.* Any regulation which limits the lead additive content of gasoline for providing octane, necessarily restricts the availability of alternatives.

CONCLUSION.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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*See *e.g.*, Nalco Main Brief pp. 42-65; Nalco Reply Brief pp. 16-24; and Nalco Supplemental Brief pp. 50-55, in the court below.

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